89-1365

PETITION FOR WRIT OF CERTIORARI

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

SERGIO M. DAMIANI, PETITIONER

- V.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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FEBRUARY 22, 1990

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QUESTIONS PRESENTED

1. Can the District Court in the face of a motion for the return of seized property (Federal Rules Criminal Procedure 41(e)) go beyond the four corners of the affidavit supporting the search warrant to find probable cause?

2. Does the knowledge by a bailee that the bailor owes the Government taxes create a criminal conspiracy in the bailment?

3. Can the government use statements of conduct intended to avoid the filing of reports of currency transactions as evidence of criminal intent as it relates to the seized property when no requirement to report is imposed upon petitioner?

LIST OF PARTIES

The parties to the proceedings below remain the parties herein. The petitioner is Sergio M. Damiani the appellant below and the respondent is the United States of America as represented by the U.S. Attorney.

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V.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner Sergio M. Damiani respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled proceeding on November 28, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reprinted in the appendix hereto, p. 1a, infra.

The memorandum and order of the United States District Court for the Southern District of Ohio, Eastern Division is reprinted in the appendix hereto, p. 7a, infra.

JURISDICTION

Following the seizure of certain property under a search warrant issued to the IRS, petitioner moved the District Court for a return of seized property pursuant to Fed. R. Crim. P. Rule 41(e). On February 8, 1989 the Magistrate recommended a partial return of the property. Exceptions were filed and on March 9, 1989 the District Court for the Southern District, Eastern Division denied in it's entirety petitioner's Motion. On March 17, 1989 petitioner appealed to the United States Court of Appeals For The Sixth Circuit. On November 28, 1989 the United States Court of Appeals For The Sixth Circuit affirmed the District Court's denial of petitioner's Motion.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Sergio M. Damiani, petitioner, sought the return of certain valuable items of jewelry that were seized from the premises that serve both as his home and place of business by the Internal Revenue Service on August 26, 1988 pursuant to a search warrant.

On August 25, 1988, agents of the Internal Revenue Service (IRS) obtained a warrant to search the home of Sergio M. Damiani and his family. The residence is also used by Mr. Damiani as his place of business as a jeweler. On August 26, 1988, the agents executed the warrant and seized over 20,000 documents and numerous valuable items of jewelry.

On October 20, 1988, the government returned certain items of jewelry that had been on consignment to Mr. Damiani from other jewelers at the time of the search and an agreement was reached concerning copying necessary documents. The return was made pursuant to a stipulation which provided that photographs could be used in evidence in lieu of the originals in any future proceedings and that the photographs would be subject to the same standards of relevancy and admissibility as the originals. The government retained several other items of jewelry valued at more than $125,000.00.

The affidavit in support of the warrant had been sealed at the request of the government at the time the warrant was issued. On September 12, 1989, counsel for Mr. Damiani moved pursuant to Rule 41 to

unseal the affidavit. On October 31, 1988, Magistrate Kemp ordered the affidavit unsealed.

On November 23, 1988, Mr. Damiani moved the District Court, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, to order the return the retained jewelry as unlawfully seized: The affidavit failed to show probable cause that the jewelry was linked with any criminal offense. The government opposed Mr. Damiani's Motion. The Honorable James L. Graham referred the Motion to Magistrate Kemp for the issuance of a report and recommendations.

On February 8, 1989, Magistrate Kemp filed his report and recommendations finding that some of the retained jewelry (the "Jewelry in the Paper Bag") had been lawfully seized, but that the remainder ("the Two Rings") had been unlawfully seized. He then ordered the government either to return the two rings or demonstrate to him in camera that they were in fact evidence in an ongoing grand jury investigation. Both Mr. Damiani and the government took exception to the Magistrate's report and recommendations.

On March 9, 1989, Judge Graham issued a memorandum and order that differed from the

Magistrate's order in finding that all of the jewelry had been lawfully seized and denied Mr. Damiani's Rule 41(e) motion in it's entirety. On March 17, 1989, Mr. Damiani filed his notice of appeal to the United States Court of Appeals for the Sixth Circuit.

On April 18, 1989, immediately following the initiation of the appeal, the government returned the Jewelry in the Paper Bang to Mr. Damiani subject to the same stipulation the had been placed upon the return of the consignment items. The issue remaining is therefor the erroneous refusal by the District Court to order return of the Two Rings.

Petitioner based his Rule 41(e) Motion entirely on the facial insufficiency of the original affidavit; no additional facts were considered by the District Court. The Two Rings are mentioned only in one paragraph of the affidavit.

> 42. Damiani told Monaghan that a friend of his got in trouble with the IRS in Florida. The friend owes the IRS thousands of dollars. Damiani said he was holding 2 rings for the friend in his basement, until the friend gets out of jail. Damiani showed Monaghan the two

rings which Monaghan described as follows: [Description omitted] . . . .

To this date petitioner has not been charged with any crime nor has any tax levy issued with regard to the rings although more than seventeen (17) months have elapsed since the search was conducted and the Two Rings seized.

REASONS FOR GRANTING THE WRIT

I.

The Sixth Circuit's decision of affirming the District Court's denial of petitioner's Rule 41(e) motion obviates petitioner's 4th and 5th amendment rights without the requirement of probable cause.

Petitioner is a jeweler. On August 26, 1988 the Internal Revenue Service, acting under a search warrant, entered petitioner's home and business premises and seized jewelry valued in the hundreds of thousands of dollars together with over twenty thousand documents. All jewelry seized with the exception of two (2) mens gold rings were seized under a theory that the jewelry had been used as a means of criminally conspiring to violate federal reporting

requirements of currency transactions. Two (2) mens gold rings assertedly held by petitioner for a friend were seized as constituting assets, the existence of which were allegedly being withheld from application to the friend's tax liability in a conspiracy to defraud the United States of tax revenue.

Nearly two (2) months later on October 20, 1988 some of the seized jewelry identified as consignment items from other jewelers were returned to the petitioner and an agreement was reached concerning the copying of necessary documents. While this matter was on appeal to the United States Court of Appeals in April of 1989, the Internal Revenue Service returned all remaining jewelry to the petitioner originally seized with the exception of the two (2) mens gold rings. At this time, nearly eighteen (18) months after the seizure, no criminal charges of any nature has been brought against the petitioner and no tax levy or other civil action has been filed by the Internal Revenue Service relating to any claimed tax liability such rings could allegedly be used to reduce.

The retention of these two (2) very valuable mens diamond rings by the Internal Revenue Service is unconscionable under the language of the search warrant and it's attendant affidavit. The actions of the Internal Revenue Service as supported by the decisions of the District Court and the Court of Appeals so erode the protection of the Fourth Amendment as to render meaningless petitioner's right to maintain lawful possession of property where government makes even the vaguest allegation in asserting probable cause to believe that a violation of 18 U.S.C. Section 371 has occurred.

The Government's only direct claim to probable cause authorizing the seizure of the two (2) rings is found in the affidavit supporting the application for the search warrant. In that affidavit an agent of the Internal Revenue Service stated that petitioner told another agent acting under cover that "a friend of his got in trouble with the IRS in Florida. The friend owes the IRS thousands of dollars.' ... he was holding two (2) rings for the friend in his basement until the friend gets out of jail." The agent further stated that petitioner showed the two (2) rings to the

under cover agent. The foregoing was the only language in a fifteen (15) page affidavit that directly established the Government's probable cause claim supportive of seizure of the rings.

United States Magistrate, Terrence Kemp, authorized the seizure of the rings accepting the foregoing statement as constituting probable cause to believe an offense had been committed with regard to the two (2) rings. However, upon reflection, and in response to the petitioner in November of 1988 moving the District Court pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure for an Order compelling the return of all seized jewelry, the Magistrate determined his initial action to have been in error as it related to the two (2) men's rings. As the Magistrate stated in his report and recommendation under date of February 8, 1989 at page 23 "Although I initially authorized the seizure of the rings based on that theory, consideration of the arguments by Mr. Damiani (petitioner) have led me to conclude that the Warrant was improperly issued as to those rings." The Magistrate was overruled by Judge Graham in a Memorandum and Order under date of March 9, 1989.

We submit that allowing Judge Graham's ruling to stand destroys the long standing legal requirement that there must be a nexus between items to be seized and criminal behavior. Warden v. Hayden, 387 U.S. 294, 304; 18 L. Ed 2d 782; 87 S. Ct. 1642 (1967); Whitley v. Warden, 401 U.S. 560; 28 L. Ed. 2d 306; 91 S. Ct. 1031 (1971).

The affidavit which must within it's four corners establish the required nexus indicates at most, according the the Magistrate who authorized the seizure, that the petitioner was holding two (2) rings belonging to a friend. That the friend had some difficulty with, and owed money to, the Internal Revenue Service. Further, the friend was in jail and the petitioner would return the rings to him upon his release. What the affidavit is silent on is far more persuasive than what it states. As the Magistrate stated in his report and recommendation "There is no indication in the affidavit that Mr. Damiani had any knowledge as to whether the Internal Revenue Service either did or did not know of the existence of the rings, whether his friend had other assets available to satisfy the alleged debt to the Internal Revenue

Service, or whether Mr. Damiani was holding the property simply because it is logical for a jailed person to want valuable property held by someone he trusts, or for some illegal purpose. It is my conclusion that the facts contained in paragraph 42 do not, of themselves, establish probable cause to believe that Mr. Damiani was engaged in conduct in violation of 18 U.S.C. Section 371 or, for that matter, that any violation of that statute had occurred." (Report and Recommendation p. 23 and 24).

The Magistrate, the same man who authorized the seizure, did therefor, upon reviewing the same exact evidence as available to him prior to such authorization, acknowledge that the warrant as to the rings had improperly issued. Although Judge Graham had before him the same sparse evidentiary statement that faced Magistrate Kemp he proceeded to find therein statements that did not in fact exist and had never been averred by the Government. From the Government's statement that the petitioner had said his friend owed money to the Internal Revenue Service, the Judge found it probable to conclude that the purpose of the petitioner holding the rings was that

of "frustrating an IRS levy." (Memorandum and Order, p. 8) From the Government's statement that petitioner told the under cover agent he was holding the rings for a friend, the District Judge assumed the ultimate issue he was to decide. Judge Graham determined that the petitioner was "boasting about holding [the two rings] for illegal purposes." (Memorandum and Order, p. 8, emphasis added). In short, the District Court built the nexus used to connect the seized rings and an alleged conspiracy to defraud the United States out of supposition and conjecture.

In assuming the ultimate issue to be decided, the District Court permitted and sanctioned action that callously disregards petitioner's Fourth Amendment rights. The degree of the disregard is evidenced by the fact that Government conduct has not in any manner matched it's assertions to the Court. In his report and recommendation, the Magistrate felt the need to enter what he referred to as a final note. He stated "The issue of whether the United States has some interest in the rings with respect to the alleged tax liability of Mr. Damiani's friend is not the type of continuing interest in the rings that would justify

their retention. That interest can be effectuated through a tax levy or other similar process." (Report and Recommendations, p. 26).

Now, nearly eighteen (18) months following the seizure of the rings no notice of a tax levy has ever been served upon petitioner as a bailee of the rings or has to petitioner's knowledge the Government taken any legal step consistent with an assertion that the rings are in any manner required to be used to satisfy petitioner's friend's tax debt to the United States. The rings have been seized from petitioner on the theory that legal proceedings would follow. The rings have retained precisely because legal proceedings have not followed.

There is no escaping the effort of the Government to venture beyond the allegations of the affidavit to make a case of the retention of the rings so patently lacking on the basis of the affidavit alone. On January 3, 1989 the Government filed it's response to petitioner's Motion for the Partial Return of Property. In that response the Government tacitly admitted to the insufficiency of probable cause in the affidavit. The Government exposed the Court to the

results of its further examination, which consisted primarily of additional speculation and conjecture. The Government told the Court that the initials on one of the two rings were the same as a man who was a customer of the petitioner and who owed the Government back taxes. The Government named the individual and cited a court conviction and declared it intended to seize the rings to apply to the man's tax liability. From a paucity of information supportive of it's seizure the Government created a tidy and complete although wholly speculative rationale of it's probable cause in the seizure of the two rings. Clearly the Government knew that it's conduct in attempting to create after the fact a framework for probable cause was improper. A warrant must stand or fall based on the information contained within the four corners of the affidavit. The warrant cannot be supported by outside information let alone information unknown and unasserted at the time of the issuance of the warrant. Whitley v. Warden, 401 U.S. 560 (1971); United States v. Hatcher, 473 F. 2d 321 (6th Cir., 1973). Perhaps even more tepling than the impropriety of the Government's statements is the accuracy of those

statements. Thirteen (13) months ago the Government advanced albeit improperly the fact that it intended that these rings be applied to a known tax liability. Thirteen (13) months later no such action has been undertaken. Eighteen (18) months following the seizure of the rings no tax levy or criminal charges have issued relating to the rings or petitioner's bailment of the rings.

II.

If the decisions of the courts below are allowed to stand the existence of a bailment of the property owned by an individual owing the Government taxes if such debt is known by the bailee will constitute probable cause to believe that a conspiracy exists to defraud the United States.

Petitioner believes that the decision and opinion of the Courts' below if allowed to stand tacitly create a new criminal offense. Petitioner is a jeweler and has been a jeweler for over twenty (20) years. It is logical to assume that any jeweler over a period of time holds jewelry belonging to others. In the instant case petitioner is alleged to have said he was holding two rings. In subsequent argument to the Court, the Government referred to petitioner as

"hiding" the rings. The cruex of the question may be the propriety of the Government seeing hiding and holding as interchangeable elements of a conspiracy to violate 18 U.S.C. Section 371.

Jewelers normally hold merchandise for purchase, repair, or safekeeping. Knowledge on the part of the jeweler that the customer owes taxes has not, to date, constituted a criminal offense. The actions of the Government in the instant case would seem to argue that a criminal offense is committed under such circumstances. Judge Graham determined that petitioner was attempting to frustrate an IRS levy. However, many people who owe taxes have assets on deposit with banks or other businesses who might know of their customer's difficulties with the IRS. Holding assets under such circumstances is legal. No such notice has ever issued. In actuality, far from the holding constituting a criminal act, petitioner could not have turned over the rings in the absence of service upon him of a valid Government Lien or attachment action. Surrendering the property without the customer's consent would have constituted a

violation of his contract of bailment. Johnson v. Steinhauer, 81 Ohio App. 202, 70 N.E. 2d 483 (1946).

III.

The government has relied upon acts unrelated to the claimed violation of 18 U.S.C. Section 371 but allegedly probable cause for a different violation to support it's seizure of the property where in reality such conduct could not have been criminal.

In addition to reading into the affidavit facts not present and presuming knowledge and intent on the part of the petitioner as it related to the seizure of the rings, the Court below states that the remainder of the affidavit evidencing petitioner's intent to violate currency transaction reporting laws is evidence of probable cause of the violation of 18 U.S.C. Section 371.

However, the fact of the matter is that the Government was simply wrong in believing that the petitioner had any responsibility to report such transactions to the IRS. The Government secured it's search warrant on the premise that it had probable cause to believe that the petitioner was violating statutes that did not relate to him at all. The Court

looked beyond the questions of the holding of the rings and found support for the probable 18 U.S.C. Section 371 violation in alleged conduct in violation of 31 U.S.C. Section 5322 and 5313 as implemented in C.F.R. Section 103.11 et seq.

The foregoing statutes do require the reporting of currency transactions to the IRS. The Government alleged petitioner was violating these statutes and was engaged in a criminal conspiracy to violate such statutes. However a review of the law discloses that petitioner is <u>not</u> required to file these reports. Statements relating to his not filing such reports can not be used to support a general criminal intent when no criminality exists in the failure to report currency transactions.

Section 5322 of Title 31 U.S.C. makes it a criminal offense for a person to violate certain provisions of subchapter 31 U.S.C. Section 5311, et seq., and it's implementing regulations. Currency transaction reports are required by 31 U.S.C. Section 5313. That section delegates the responsibility to set filing requirements for "financial institutions"

entirely to the Secretary of the Treasury who is authorized to promulgate implementing regulations.

The regulations promulgated by the Secretary are found at 31 C.F.R. Section 103.11, et seq. The Secretary's regulations require "financial institutions" to file currency reports whenever a transaction in excess of $10,000.00 occurs. 31 C.F.R. Section 103.22. 31 C.F.R. 103.11(g), the Secretary exhaustively defines by regulation the classes of persons deemed to be financial institutions: banks, securities dealers, sellers of traveler's checks, licensed fund transmitters, telegraph companies, gambling casinos, persons subjected to state or federal banking regulations or the U.S. Postal Service. Nothing in the foregoing places any reporting responsibility upon the petitioner as a jeweler or as a coin dealer. In the affidavit and application for search warrant the Government believed that petitioner's not filing reports was the crime for which it found probable cause to support a search warrant.

Judge Graham below relied upon affidavit assertions that petitioner's conduct and statements

disclosed he did not file reports as an indication of his general criminal intent to also frustrate an IRS levy on the rings. However, the petitioner committed no criminal offense by dealing in large sums of money and not recording or reporting his customer's names as long as he reports his income from his sales. In short, the affidavit cites conduct as probable cause for a crime that does not exist as it related to petitioner.

The Government argues that the Secretary carried forward the definition of "financial institution" contained at 31 U.S.C. Section 5312 into the implementing regulations. A reading of the regulations would have revealed, however, that the Secretary deliberately made the class of persons obligated to file much narrower than the statutory definition of "financial institution", as he was authorized to do by the "may prescribe" (non mandatory) language contained in 31 U.S.C. Section 5313.

CONCLUSION

Petitioner seeks the granting of certiorari in support of his right to redress the violation of his

constitutional rights. Rule 41(e) was designed to provide a remedy to redress violations of the Fourth Amendment protection against unreasonable search and seizures and the Fifth Amendment's provision against deprivation of property without due process of law.

The warrant in the instant case fails to connect the seized property to any crime. The Government has seized and retained non-contraband property. It has done so predicated upon an affidavit that alleges conduct that simply does not constitute criminal activity in one instance and does not constitute probable cause in the other instance. No nexus has been established between the property seized and any crime.

This Petition for Certiorari should be granted in furtherance of a declaration that Government may not seize property without probable cause to believe

it is evidence of a crime and then retain it for years or perhaps indefinitely without further process.

Respectfully Submitted,

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February 22, 1990

APPENDIX

[Printed copies of Opinion and Judgement of the Court of Appeals and the Memorandum and Opinion of the District Court].

APPENDIX A

No. 89-3250

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SERGIO M. DAMIANI,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court of Ohio.

BEFORE: KENNEDY and RYAN, Circuit Judges; and EDWARDS, Senior Circuit Judge.

PER CURIAM. Appellant Sergio M. Damiani seeks the return of certain items of jewelry that were seized from the premises that serve as his home and his place of business. The items, together with over 20,000 documents and other items of jewelry, were seized by the Internal Revenue Service (IRS) on August 26, 1988, pursuant to a search warrant.

On November 23, 1988, appellant filed a motion for the return of property seized during the execution of the search warrant. On January, 18, 1989, the District Court referred the motion to a Magistrate for report and recommendation. The Magistrate filed his recommendations on February 8, 1989. Because both

parties objected to his recommendations, the District Court reviewed the Magistrate's findings.

This appeal concerns only certain of the seized items -- namely, two rings that were found in a plastic bag in appellant's basement. The Magistrate found that the search warrant affidavit did not establish probable cause to seize the rings, and he therefore recommended that the two rings be returned to appellant unless the government could present evidence in camera of any value the rings might have as evidence in a grand jury investigation. The District Court, however, found that the two rings were lawfully seized pursuant to the warrant and that, in any event, appellant did not show that he was entitled to the return of the rings.

We find that there is sufficient evidence to warrant the District Court's finding that the rings were lawfully seized. Accordingly, we AFFIRM the District Court's denial of appellant's motion for partial return of the property.

On August 26, 1988, following an extensive undercover investigation, agents of the Internal Revenue Service executed a search warrant at the home

and business of appellant, 1356 Haines Avenue, Grandview Heights, Ohio, a single family, two-story building with a basement. The search warrant and affidavit in support of that warrant authorized IRS agents to seize a variety of documents and jewelry, including two large diamond rings found in a plastic baggie in the basement of appellant's premises.

Appellant argues that the rings should be returned to him because the District Court erred in finding that they were lawfully seized. Specifically, appellant contends that the search warrant affidavit did not establish probable cause to warrant seizure of the rings. This court has stated:

> Probable cause to conduct a search exists when the facts and circumstances described in the affidavit indicate a "fair probability" that evidence of a crime will be located on the premises of the proposed search ... In deciding whether there is probable cause to believe that contraband or evidence is located in a particular place, the "totality of the circumstances approach" should be used ... Affidavits in support of an application for a search warrant are to be reviewed by both courts and magistrates in a realistic and common sense fashion.

United States vs. Algie, 721 F.2d 1039, 1041 (6th Cir. 1983) (citations omitted).

Paragraph 42 of the search warrant affidavit provides the following facts related to the two rings:

> Damiani told Monaghan [the undercover agent] that a friend of his got in trouble with the IRS in Florida. The friend owes the IRS thousands of dollars. Damiani said he was holding 2 rings for the friend in his basement, until the friend gets out of jail. Damiani showed Monaghan the two rings which Monaghan described as follows ....

Joint App. at 26. This paragraph is followed by a detailed description of the two rings.

Appellant argues that this paragraph is the only reference to the rings in the entire affidavit, and that the paragraph does not establish a probability that appellant's possession of the two rings was part of an illegal agreement concerning the unidentified friend's tax liability or a larger conspiracy to help persons avoid tax liability by not reporting currency transactions. Appellant fails to recognize that the remaining portion of the affidavit contains evidence sufficient to support a finding of probable cause that appellant's possession of the two rings involved criminal intent. For example, there was evidence that appellant would not report the receipt of large amounts of cash to the government (Joint App. at 20); that he would exchange gold coins for cash "off the books" and without performing any paperwork (Joint App. at 21); that appellant was aware that he was breaking two or three laws (Joint App. at 23); that he would only deal with one person in the room because he did not want any witnesses (Joint App. at 23); that he frequently does cash transactions without paperwork (Joint App. at 23); that appellant instructed the undercover agent not to use his real name in certain transactions (Joint App. at 23); that appellant would

provide the agent with a written statement that the agent was holding diamonds on consignment for appellant when this would not be the case (Joint App. at 25); and that appellant stated to the agent that he does not report customers who deal in large amounts of currency to the IRS and that he has assisted other customers in concealing large currency purchases of jewelry (Joint App. at 26).

We believe that these facts described in the affidavit "indicate a 'fair probability'" that evidence of a conspiracy to defraud the United States under 18 U.S.C. Section 371 would be located on appellant's premises. Algie, 721 F.2d at 1041. Such a conspiracy is defined to reach not only situations where the United States is actually deprived of funds but also "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.'" Dennis v. United States, 384 U.S. 855, 861 (1966)(quoting Haas v. Henkel, 216 U.S. 462, 479 (1910)). The District Court did not err in finding that the facts set forth above established probable cause that appellant was engaged in a conspiracy for the purpose of obstructing the lawful function of the IRS. We agree with the District Court that:

> A commonsense reading of paragraph 42 suggests the reasonable inference that Mr. Damiani was holding the two rings for his friend in Florida who owed the IRS "thousands of dollars" to assist the friend in frustrating an IRS levy

> on the property.[1] This interpretation is supported by other information in the affidavit ....

Joint App. at 123 (footnote added). Accordingly, we AFFIRM the District Court's denial of appellant's motion for the partial return of property.[2]

[1]We disagree with appellant that "it is simply not possible to conspire to frustrate a levy that has not yet issued." One may conspire to prevent a levy from issuing, thereby "conspiring to frustrate a levy that has not yet issued."

[2] Because we find that the District Court did not err in finding that the rings were lawfully seized, we need not reach the issue of whether appellant must show or has shown a need for the return of the rings or that he will suffer irreparable harm if the two rings are not returned prior to the completion of the criminal investigation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re Search of
1356 Haines Avenue
Grandview Heights, Ohio
A Single-Family, Two-Story
Building with a Basement.

Case No. M-2-88-301-TK
JUDGE GRAHAM

MEMORANDUM AND ORDER

On August 2, 1988, a search warrant was issued by Magistrate Terence P. Kemp which authorized the search of 1356 Haines Avenue, Grandview Heights, Ohio. On November 23, 1988, the owner of the premises, Sergio Damiani, filed a motion for the return of property seized during the execution of the search warrant. On January 18, 1989, this court referred the motion to Magistrate Kemp for report and recommendation. The Magistrate filed his recommendations on February 8, 1989. This matter is now before the court on the objections of Mr. Damiani and the government to the report and recommendation.

The property sought to be recovered by Mr. Damiani consists of a paper bag containing certain items of jewelry, and two rings. The Magistrate recommended that Mr. Damiani's motion be denied as to

the jewelry in the paper bag after finding that it had been lawfully seized by the government. The Magistrate further recommended that the two rings be returned to Mr. Damiani unless the government presented evidence in camera of any value the rings might have as evidence in a grand jury investigation. The in camera review procedure included in the Magistrate's report is subject to review under the "clearly erroneous or contrary to law" standard. The remainder of the report is subject to de novo review by this court pursuant to 28 U.S.C. Section 636(b)(1).

The affidavit submitted in support of the request for a search warrant is lengthy and will not be repeated here. The court hereby incorporates by reference the entire affidavit as part of this order. The affidavit indicates that Mr. Damiani has been under investigation for possible violations of the currency transaction and foreign bank account reporting requirements of 31 U.S.C. Section 5313 and 31 C.F.R. Section 103.22 and 103.24, structuring transactions to prevent a currency transaction report from being filed by a financial institution in violation of 31 U.S.C. Section 5324, and conspiracy to

defraud the United States in violation of 18 U.S.C. Section 371.

The affiant stated that in June of 1988, IRS Special Agents Monaghan and Avila, working undercover, were introduced to Mr. Damiani by Chuck Saultz. The agents negotiated with Mr. Damiani for the purchase of $100,000 in American Eagle gold $20 coins. Agent Monaghan represented to Mr. Damiani that the source of his money was cocaine proceeds, and that he wanted to convert the money into gold coins so that he could transport it out of the country without the IRS knowing about it. Mr. Damiani made several calls to investigate the feasibility of the sale, and had additional conversations with Agent Monaghan. Mr. Damiani ultimately arranged for Agent Monaghan to purchase $50,000 in gold coins from Donald DeVore, a Columbus dealer in coins, with the understanding that no report would result from the $22,800 in currency given by Agent Monaghan to Mr. DeVore on August 3, 1988 and the $27,360 in currency given to Mr. DeVore on August 5, 1988.

The affiant further stated that on August 25, 1988, Agent Monaghan discussed with Mr. Damiani how he

could transport $200,000 in cocaine proceeds overseas. Mr. Damiani suggested that Agent Monaghan purchase jewelry and wear the jewelry out of the country. Agent Monaghan made arrangements to purchase approximately $200,000 in jewelry, and Mr. Damiani placed the twelve pieces in a brown paper bag. The bag was seized during the execution of the search warrant, and Mr. Damiani now seeks the return of the jewelry in the bag.

The two rings which make up the remainder of the property were seized as the result of Agent Monaghan's conversation with Mr. Damiani, as related in paragraph 42 of the affidavit. Mr. Damiani reportedly stated that a friend of his got into trouble with the IRS in Florida, that the friend owes the IRS thousands of dollars, and that he was holding two rings for the friend in his basement, until the friend gets out of jail. He showed the two rings in question to Agent Monaghan.

Mr. Damiani seeks return of the jewelry pursuant to Fed. R. Crim. P. 41(e). As the Magistrate correctly noted in his report, there is some disagreement among courts as to whether Rule 41(e) may

be invoked when no indictment has been filed or other criminal proceeding commenced, as is the case here. Compare Hill v. McMartin, 432 F. Supp. 99 (E.D. Mich. 1977) and Camacho v. United States, 645 F. Supp. 725 (E.D. N.Y. 1986). Regardless of the applicability of Rule 41(e), it has been explicitly or implicitly recognized that courts have "anomalous jurisdiction" rooted in the court's supervisory power over federal law enforcement officials to order the return of property. See, e.g., Hunsucker v. Phinney, 497 F.2d. 29 (5th Cir. 1974); Coury v. United States, 426 F.2d. 1354 (6th Cir. 1970).

Rule 41(e) is "a crystallization of a principal of equity jurisdiction." Smith v. Katzenbach, 351 F.2d 810, 814 (D.C. Cir. 1965). Motions for the return of property are governed by equitable principles regardless of whether the motion is based on Rule 41(e) or the court's general equitable jurisdiction. Floyd v. United States, 860 F.2d. 999 (10th Cir. 1988); In re Harper, 835 F.2d 1273 (8th Cir. 1988). Thus, in addition to the showing that the property was "illegally seized" required by Rule 41(e), other factors to be considered include whether

the movant has an individual interest in and need for the material whose return he seeks, whether the movant would be irreparably injured by denial of the return of the property, and whether the movant has an adequate remedy at law for the redress of his grievance. In re $89,000, Plus or Minus, in United States Currency and Checks, 691 F. Supp. 1411 (N.D. Ga. 1988).

Mr. Damiani has objected to the Magistrate's finding that the jewelry in the paper bag was lawfully seized as evidence. He further objects to the decision of the Magistrate not to order the immediate return of the two rings. The government objects to the findings of the Magistrate that Mr. Damiani was in lawful possession of the two rings and that the search warrant did not establish probable cause for the seizure of the two rings.

Based upon a review of the entire affidavit, the court agrees with the finding of the Magistrate that the jewelry in the brown paper bag was lawfully seized. A search warrant need not be supported by evidence sufficient to show guilt beyond a reasonable doubt; rather, it must be supported by probable cause.

United States v. Ventresca, 380 U.S. 102 (1965). Probable cause exists where the facts known to the agents, based upon their own knowledge or other reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Draper v. United States, 358 U.S. 307 (1959). The affidavit sets forth information which indicates that Mr. Damiani, in addition to being a seller of jewelry, was also in the business of exchanging currency and converting funds, while intentionally structuring the transactions to avoid the filing of a currency transaction report, or conspiring with others to avoid the filing of a report or to otherwise defraud the United States.

The government argues that Mr. Damiani's business activities would fall within the definition of a "financial institution" under 31 C.F.R. Section 103.11(g)(3), as a currency dealer or exchanger, or under (g)(5), as a person engaged in the business of transmitting funds. The affidavit alleges facts which suggest that Mr. Damiani does business as a currency dealer or exchanger, or a transmitter of funds, so as

to fall within the reporting requirements of 31 C.F.R. Section 103.22.

However, regardless of whether the regulations are so construed, the court finds that the affidavit establishes probable cause that Mr. Damiani, either as a principal or as a conspirator, engaged in conduct which violated 31 U.S.C. Section 5324 by structuring or attempting to structure transactions with the purpose to evade the financial reporting requirements. The information in the affidavit also supports a finding of probable cause that Mr. Damiani was engaged in a continuing conspiracy to defraud the United States under 18 U.S.C. Section 371. The jewelry in the brown paper bag was the subject of a proposed purchase by Agent Monaghan using funds represented to Mr. Damiani as being proceeds from drug dealing, with assurances from Mr. Damiani that no "paper trail" would result from the transaction. The court agrees with the Magistrate's finding that the jewelry in the brown paper bag was properly seized as evidence of the intentional participation of Mr. Damiani in an ongoing conspiracy to violate Section 5324 or to otherwise defraud the United States. The court adopts the

report and recommendation of the Magistrate as to the paper bag of jewelry.

The remaining property consists of the two rings which Mr. Damiani referred to as property he was holding for a friend who owed money to the IRS. The Magistrate approved the seizure of the rings as part of the search warrant. The Magistrate reconsidered his evaluation of the warrant in his report and recommendation and found that the warrant affidavit did not establish probable cause to seize the rings.

The court, upon reviewing the affidavit, finds that the Magistrate's initial determination upon issuing the search warrant was correct. A conspiracy to defraud the United States under 18 U.S.C. Section 371 is broadly defined to reach not only situations where the United States is actually deprived of funds but also any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government. Dennis v. United States, 384 U.S. 855 (1966). Probable cause is "a practical nontechnical conception" involving factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians,

act. Brinegar v. United States, 338 U.S. 160, 175, 176 (1949). A commonsense reading of paragraph 42 suggests the reasonable inference that Mr. Damiani was holding the two rings for his friend in Florida who owed the IRS "thousands of dollars" to assist the friend in frustrating an IRS levy on the property. This interpretation is supported by other information in the affidavit describing conversations between Mr. Damiani and Agent Monaghan, in which Mr. Damiani described his business operations. These conversations suggest that Mr. Damiani was trying to encourage Agent Monaghan, who represented himself as being a drug dealer with money to "launder," to do business by impressing him with instances in which he was successful in outwitting the government and evading the requirements of the law. If he were merely holding the rings for safekeeping, it would be illogical for him to advertise them to Agent Monaghan. Considering the totality of the affidavit, it is logical to conclude that he was boasting about holding them for an illegal purpose.

The court further notes that even if the rings had been unlawfully seized, return of the rings would

not necessarily be appropriate. Mr. Damiani has not established a strong individual need or interest in the two rings, since he does not own the rings and was holding them merely as a bailee. Further he has not established that he will suffer irreparable injury if the rings are not returned to him, a requirement for Rule 41(e) jurisdiction. Floyd v. United States, 860 F.2d at 1003.

Therefore, the court declines to adopt the report and recommendation of the Magistrate in regard to the two rings, and finds instead that they were lawfully seized pursuant to the warrant and that, in any event, Mr. Damiani has not shown that he is entitled to the return of that property. In light of this ruling, the court finds that it is not necessary to address the government's objection as to Mr. Damiani's standing to seek return of the property.

In accordance with the foregoing, the Magistrate's report and recommendation is adopted in part and rejected in part. The motion of Mr. Damiani for the partial return of property pursuant to Rule 41(e) is denied.

James L. Graham
United States District Judge

DATE: March 9, 1989